

25 November 2009

Our ref: SPW:2901465
Your ref: C2009/1884

The General Manager
Adjudication Branch
Australian Competition and
Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Via Email: adjudication@accc.gov.au

Dear Sir

Collective Bargaining Notification CB00138 lodged by Hertz Australia Pty Ltd

We act on behalf of Mackay Airport Pty Ltd.

In accordance with our instructions, we **attach** submissions that our client puts forward in response to the abovementioned collective bargaining notification.

Kindly knowledge receipt in due course.

Yours faithfully
MILLER HARRIS LAWYERS
Per:

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Collective Bargaining Notification (CB 00138)

**Hertz Australia Pty Ltd
ABN 31 004 407 087**

SUBMISSIONS ON BEHALF OF MACKAY AIRPORT PTY LTD ACN 132 228 534

Mackay Airport Pty Ltd ACN 132 228 534 ("MAPL") is the target named in the Notification for Collective Bargaining (CB00138) lodged by Hertz Australia Pty Ltd ABN 31 004 407 087 on behalf of:

- Kingmill Pty Ltd trading as Thrifty Car Rental ("Thrifty");
- WTH Pty Ltd trading as Avis Australia ("Avis");
- Budget Rent A Car Australia Pty Ltd ("Budget"); and
- CLA Trading Pty Ltd trading as Europcar ("Europcar"),

(and for the purpose of these submissions, each entity and Hertz are collectively referred to as "group members").

In response to the Notification for Collective Bargaining (which, for ease of reference, is called the "collective bargaining notification"), MAPL makes the following submissions:

Background

1. MAPL is the operator of the Mackay Airport and has control of airport facilities at Mackay, including the terminal buildings and car parks ("Mackay Airport").
2. Each group member conducts the business of motor vehicle hire at various locations throughout Australia, including the Mackay Airport.
3. So far as the Mackay Airport is concerned, each group member carried on their respective businesses from the terminal building and the car park up to and including 30 September 2009 by authority of:
 - 3.1. a lease granted by the Mackay Port Authority (the predecessor entitled to the current owner of MAPL land);
 - 3.2. a car hire bay agreement also granted by Mackay Port Authority.
4. Each lease and car hire bay agreement in favour of a group member expired on 30 September 2009 and currently, group members conduct their respective businesses from Mackay Airport as tenants at will.
5. MAPL has tendered to each group member:

- 5.1. a licence agreement to make use of part of the car parks situated on Mackay Airport; and
 - 5.2. a lease to occupy a counter within the Mackay Airport Terminal Building, to facilitate ongoing business operations by each group member from Mackay Airport.
6. The collective bargaining notification lodged by or on behalf of group members relates to the terms and conditions of the proposed licence agreement and terminal lease.

Operators

7. Currently, six entities conduct motor vehicle hire businesses from the Mackay Airport. Those entities are made up of each respective group member and Waterloo Car Centre Pty Ltd ACN 003 616 420 trading as Red Spot Car Rentals ("Red Spot").
8. Red Spot is not a group member and has already executed a letter of offer signifying its acceptance of the fundamental terms and conditions of the proposed licence agreement and terminal lease (including price, term, minimum guarantee payments, type and location of facilities).

The Group

9. There are only five group members.
10. Of those, Avis and Budget share common directors in that:
 - George Johan Proos;
 - Patrick Thomas Siniscalchi; and
 - Ronald Lewis Nelson,

are the only directors of WTH Pty Ltd and, together with Ann Maree Dawson, they are the only directors of Budget Rent A Car Australia Pty Ltd.
11. It therefore appears that Budget and Avis are "associated entities" as that expression is defined by section 50AAA of the *Corporations Act 2001*¹ and, if that is accepted, the collective bargaining group therefore effectively consists of only four members.

The Market

12. Group members maintain that "there is no need to analyse the geographical dimension of the relevant market"².

¹ See section 50AA(1) *Corporations Act 2001* (as to "control")

² Clause 3.6, Collective Bargaining Notification

13. MAPL respectively submits then in the context of the collective bargaining notification, it is erroneous to disregard issues of market.
14. MAPL further submits that the Mackay Airport is the "relevant market" and that the custom of each group member, to the extent that it is derived from sources other than persons commuting to, through and from Mackay via the Mackay Airport, is negligible.
15. By forming a group to collectively negotiate the terms and conditions of the licence agreement and terminal lease, including prices payable thereunder³, there will be limited competition between car rental operators within the relevant market.
16. MAPL submits that by being allowed to form a collective bargaining group, group members are likely to collude thereby generating distortions within the relevant market to the detriment of other participants (including Red Spot and any future operators of car rental businesses carried on from Mackay Airport).

The Process

17. Group members allege that "to date there has been little to no scope to negotiate terms of the proposed agreements with MAPL". Group members go on to assert that "MAPL has offered its contracts essentially on a "take it or leave it" basis, offering standard form contracts with little scope for negotiation."⁴
18. That allegation is not supported by any factual matter.
19. MAPL has negotiated terms of the proposed arrangements with Red Spot and has achieved a compromise suitable to both sides.
20. Subject to clause 24, none of the group members have raised any issues with regard to the proposed car park licence or terminal lease to date, at least with sufficient clarity so as to allow MAPL to specifically identify the relevant issues.
21. Indeed, immediately prior to being informed of the proposal to lodge the Collective Bargaining Notification, MAPL understood from limited communications with two group members that the licence agreement and terminal lease were generally acceptable.
22. MAPL has made numerous attempts to open negotiations with group members, largely to no avail. Particulars of attempts made by MAPL will be available on request.
23. With the exception of Avis and Budget, group members have failed to respond in any substantive way to MAPL in its attempts to discuss the terms and conditions of the proposed licence agreement and terminal lease.
24. So far as Avis and Budget are concerned, George Proos (a director of both Avis and Budget) wrote to MAPL by email seeking clarification and amendment to the

³ Clause 3(g)(vi) of the Collective Bargaining Notification

⁴ Clause 1.9 , Annexure 3

licence agreement and the terminal lease on behalf of Avis and Budget on 19 September 2009. MAPL responded to that email on 22 September 2009 providing clarification and agreeing to certain amendments to the proposed agreements. There has been no further progress with Avis or Budget.

25. MAPL's agreement to amend certain terms of the proposed licence agreement and terminal lease exemplifies its willingness to negotiate terms and displaces the assertion by group members that agreements have been tendered on a "take it or leave it" basis.
26. To date, MAPL believes there have been no genuine attempts on behalf of group members to negotiate the terms or even discuss the draft car park licence and terminal lease with MAPL.

The Public Benefit

27. Group members maintain that they will be unable to absorb "significant cost increases"⁵ sought by MAPL and will be forced to pass such costs on to customers of car rental services.
28. MAPL believes that charges proposed under the licence agreement and terminal lease are not out of step with similar charges imposed at other airports across the country.
29. MAPL seeks to recover from operators of car rental services from Mackay Airport:
 - rental under the terminal lease which MAPL submits is commensurate with the current market and represents a fair return to MAPL for the service provided;
 - a car park fee which MAPL submits is commensurate with the current market and represents a fair return to MAPL for the service provided. (The proposed car park fee ties the cost of usage of car parking bays by group members to the corresponding "long term" car parking fee charged by MAPL in year 3 of the proposed licence agreement. Concessional rates are available during years 1 and 2);
 - a turnover fee which MAPL submits is commensurate with the current market and represents a fair return to MAPL for the service provided.
30. MAPL concedes that rates of return will increase under the proposed licence agreement and terminal lease but submits that any such increases represent a fair return for services provided and are not overstated in any way.
31. MAPL notes that group members do not appear to suggest that cost increases under the proposed licence agreement and terminal lease are out of step with market rates charged at other airports throughout the country.
32. MAPL does not accept any suggestion by group members that increased charges under the car park hire agreement or the terminal lease will have any effect on

⁵ Clause 3.13(b)

tourism in the Mackay region whatsoever. MAPL takes this position based on independent surveys conducted at Mackay Airport⁶ that indicate that the purpose of travel of persons moving through the airport fall largely within the following categories:

- Business 44%
- Residents/visitors to residents 25%
- Holiday makers 25%

33. Group members also allege that if MAPL was subject to significant competitive restraint, it would not be imposing significant price increases. As submitted below, MAPL is already subject to significant competitive restraint, given its need for car rental operators to be situated upon airport land for the benefit of aircraft passengers.

The Public Detriment

34. Car rental services are a necessary and fundamental adjunct to the operation of an airport, particularly in regional areas where alternate means of transportation is limited.
35. As the operator of a fully functional airport, MAPL requires car rental operators conducting business upon the Mackay Airport.
36. By being allowed to form a collective bargaining group, group members will effectively form a cartel substantially giving rise a monopoly for the provision of car rental services from Mackay Airport.
37. Group members should be aware of the limited ability of MAPL to fairly and adequately negotiate the terms of the proposed licence agreement and terminal lease if they are allowed to effectively form a cartel to garner greater negotiating power over MAPL.
38. There is no imbalance of power (favouring MAPL) as group members suggest.⁷
39. The needs of MAPL and each group member individually are equal in the absence of collective bargaining.
40. If group members are permitted to form a group to collectively bargain the terms and conditions of the proposed licence agreement and terminal lease, there is likely to be a significant imbalance in bargaining power (favouring group members) thereby creating a substantial distortion in the relevant market to the detriment of Red Spot and any future car rental operators who may conduct business from the Mackay Airport.
41. Moreover, if MAPL should be unable to effectively negotiate the terms and conditions of the proposed licence agreement and terminal lease, particularly

⁶ "Passenger and Major Visitor Survey" undertaken by Calmar Brunton – July 2007

⁷ Clause 3.13(b)

with regard to pricing, it may be forced to look at price increases in other areas to compensate for the concessions that group members may be able to negotiate for themselves. This will inevitably be to the detriment of the public at large who will be forced to "pick up" any additional costs as end users.

Public Benefit –v- Public Detriment

42. Group members seek to negotiate with MAPL on a number of issues including "price".⁸
43. On the issue of price, MAPL submits that there will be no discernable public benefit brought about by collective bargaining.
44. At present, group members "on-charge" to their customers an "airport charge" for vehicles hired from airports across the country (including Mackay Airport).
45. Since receiving a copy of Collective Bargaining Notification, MAPL has undertaken its own enquiries from information publicly available concerning airport charges. Those enquiries have revealed that to fully recover Mackay Airport charges from customers, group members would be passing on a lesser charge to their customers at Mackay than what they do at present at a number of other airports.
46. MAPL therefore submits that the Commission should object to the collective bargaining notification if it is satisfied that the benefit to the public brought about by the ability of group members to collectively negotiate with MAPL is not outweighed by public detriment.
47. Given MAPL's submissions above, MAPL further submits that public detriment will significantly outweigh any benefit to the public brought about by the ability of group members to collectively negotiate with MAPL as to the terms and conditions of the proposed licence agreement and terminal lease.
48. MAPL therefore respectively submits that the Commission should object to the collective bargaining notification.⁹

Miscellaneous

49. Group members maintain that the proposed car park licence and terminal lease "are a significant departure from the current terms"¹⁰.
50. MAPL concedes there is a significant departure in terms. Agreements formulated by the Mackay Port Authority (the predecessor in title to the current owner of the Mackay Airport) took the form of:
 - a one and a half page (A4 size) document entitled "Car Hire Bay Agreement" which is bereft of many generally accepted commercial

⁸ Clause 3(g)(vi)

⁹ ACCC Assessment, Collective Bargaining Notification lodged by Australian Medical Association (VIC) Pty Ltd on behalf of a group of doctors at La Trobe Regional Hospital, 19 December 2007, notification no. CB00004

¹⁰ Clause 1.8, Annexure 3

terms and conditions which are relevant to an agreement of this type;
and

- a lease originally prepared in July 2004 which fails to address numerous issues of significance including:
 - the *Airport Assets (Restructuring and Disposal) Act 2008*;
 - airport security concerns;
 - private ownership of the airport,

and a host of other issues which are relevant to the industry and the relationship of both MAPL and individual group members.

51. MAPL takes the view that the change in terms of the proposed car park licence and terminal lease is driven by commercial necessity more than any other reason.

Conclusion

For the reason set out above, MAPL submits that the commission should serve an objection notice in respect of the collective bargaining notification lodged by Hertz on behalf of group members. This is because the proposed conduct will cause identifiable detriment and will generate no discernable public benefit.